Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

82-1209
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE G. GALLANTZ
Counsel for Petitioner
300 Park Avenue
New York, New York 10022
(212) 909-7052

ALLAN H. WEITZMAN
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
Of Counsel

QUESTION PRESENTED

Whether a court of appeals applies the correct burden-of-proof test when it concludes that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) if, in a "dual motive" discharge case, when the question is close, it is shown that the "force" of anti-union purpose is "reasonably equal" to the admittedly lawful motive for terminating an employee.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	7
Appendix A—Opinion of Court of Appeals in *NLRB* v. *Brewton Fashions, Inc.*, 682 F.2d 918 (11th Cir. 1982)	A-1
Appendix B—Decision and Order of NLRB in *Brewton Fashions, Inc. and ILGWU*, 252 N.L.R.B. 1038 (1980)	A-16
Appendix C—Decision of Administrative Law Judge in *Brewton Fashions, Inc. and ILGWU*, 252 N.L.R.B. 1038 (1980)	A-19
Appendix D—Denial by Order entered October 18, 1982 of petition for rehearing and suggestion for rehearing en banc	A-36
Appendix E—Judgment of Court of Appeals, issued December 3, 1982	A-37

TABLE OF AUTHORITIES

PAGE

CASES

Behring International Inc. v. *NLRB*, 675 F.2d 83 (3d Cir. 1982) 6

NLRB v. *Transportation Management Corp.*, No. 82-168 (November 15, 1982) 5, 6, 7

Wright Line, 251 N.L.R.B. 1083 (1980), *aff'd*. 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) 3, 5, 6

STATUTES

National Labor Relations Act, 29 U.S.C. §§ 157, 158(a), 160(c) 2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO.

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brewton Fashions, Inc., a Division of Judy Bond, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 682 F.2d 918. The decision and order of the National Labor Relations Board (App. B, *infra*) and the decision of the administrative law judge (App. C, *infra*) are reported at 252 N.L.R.B. 1038 (1980).

JURISDICTION

The opinion of the court of appeals was issued August 13, 1982. The petition for rehearing and suggestion for rehearing en banc were denied by order entered October 18, 1982 (App. D, *infra*). The judgment of the court of appeals was issued December 3, 1982 (App. E, *infra*). Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, provides in part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]. . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

STATEMENT

This petition presents a question closely related to and encompassed in the question presented in *Transportation Management Corp.*, No. 82-168, in which this Court granted certiorari on November 15, 1982. That case, like this one, requires examination of the Board's *Wright Line* test which announced a new burden of proof rule for dual-motive discharge cases. *Wright Line*, 251 N.L.R.B. 1083, 1086-88 (1980).

Before October 1978, petitioner had hired an engineer to improve the efficiency of its blouse manufacturing plant located in Brewton, Alabama. In February or March 1979, the engineer recommended that every trimmer be assigned to load his or her own cart with the trimmed garments and to push it to the sewing room (R. 179-80, 220-23).

Two trimmers, Kathleen Chavers and Grace Boozer, each refused in March 1979 to push the cart alone (Employer's [respondent below] Ex. 17; *accord*, R. 192-93). They claimed that this was "men's work." Petitioner told Chavers and Boozer that their response was unsatisfactory. They persisted in their refusal to perform the jobs assigned to them. On

Friday, March 30, 1979, Chavers and Boozer were told to reconsider their refusal over the weekend and not come back to work if "you're not going to push the buggy." (R. 37) Management then issued formal warnings to Chavers and Boozer (R. 68-69, 269-70, 289).

After their weekend of thinking it over, Chavers and Boozer returned to work on Monday, April 2, 1979, but adhered to their refusals to push their carts despite the repeated requests of their immediate supervisor, Charles Hawkins, that they at least attempt to do the work as assigned. They were told that their supervisor would provide assistance whenever the loads were particularly heavy, but each still refused to try to do the job alone (R. 84-85, 128, 258, 303, 338). They adamantly claimed that pushing the cart was a "man's job . . . that's all there is to it." (R. 258, 328-29; *see also* R. 25, 28, 66, 71, 107-08, 262).

All these events occurred before the beginning of any union activity at the plant. Thus, petitioner could then have lawfully discharged Chavers and Boozer for their insubordinate conduct. Instead, management acceded to the requests of Chavers' and Boozer's immediate supervisor that these long-term employees be given sufficient time to adjust to the new methods.

It first became known to management on April 25, 1979, that an attempt was being made by an employee Pugh to solicit union cards at the Brewton plant (R. 140). There is, however, no concrete evidence in the record that Chavers and Boozer ever actually became union adherents. There is evidence that Chavers and Boozer remained insubordinate.

About June 15, 1979, other employees, male and female, complained to management that Chavers and Boozer were intentionally making a mockery of the system of work assignments (R. 16, 310-11). Management then reluctantly concluded that Chavers and Boozer were destroying employee morale and could no longer be permitted to undermine the effort to increase efficiency and productivity.

On Monday, June 18, 1979, they were asked, once again, if either would push the cart alone. Each refused and they were both discharged (R. 269).

In deciding to enforce the Board's order, the court of appeals said:

> We do not deny that the evidence presents a close question; however, "the Board is not required to establish substantial evidence that conduct is motivated *solely* by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was '*reasonably equal*' to the lawful motive prompting conduct," *N.L.R.B.* v. *Aero Corp., supra*, 581 F.2d at 514-15 (emphasis ours), and that discharge would not have occurred in the absence of protected activity. We conclude that the Board has met that standard here.

(682 F.2d at 923).

REASONS FOR GRANTING THE PETITION

Like *NLRB* v. *Transportation Management Corp.*, No. 82-168, in which this Court granted certiorari on November 15, 1982, this case raises an important question concerning the burden of proof in a "dual motive" case in which an employer, charged with having violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), offers evidence—credited by the court below in this case—that it would have discharged the employee for legitimate reasons, absent his or her union activities.

Central to the decision of both *Transportation Management Corp.* and this case is the correctness of the decision of the First Circuit in *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The new formulation of the burden of proof in "dual motive" cases, announced by the Board in *Wright Line*, 251 N.L.R.B. 1083 (1980), had not yet been reviewed by the First Circuit when the briefs in this case were filed below.

The Board, in its brief to the court below, discussed in detail the Board's *Wright Line* formulation and argued for its validity, while denying that any "question of dual or mixed

motive" was presented in this case. (Brief below for the NLRB at 16n).

It is true that the Board did dismiss, as pretextual, the substantial evidence that these employees had been discharged for legitimate reasons. But the court below disagreed and found "that the evidence presents a close question." (682 F.2d at 923). However, it resolved that close question by substituting for the Board's finding of "pretext" its own conclusion that the "force" of anti-union purpose was "reasonably equal" to petitioner's admittedly lawful motive. It was undisputed that that lawful motive had existed before the union organization began, and there was substantial evidence that that lawful motive still existed when the employees were ultimately discharged for making a mockery of the employer's assignment system.

Even assuming the correctness of the Board's *Wright Line* formulation, the "reasonably equal force" of the employer's evidence should have been held sufficient to entitle it to a dismissal of the Board's complaint. Instead, the court below, while avoiding any explicit discussion of burden of proof in a dual-motive case, effectively relieved the Board of complying with the unambiguous requirement in Section 10(c) of the Act, 29 U.S.C. § 160(c), that it must prove its case by a "preponderance of the testimony." The effect of the decision is instead to require the employer in a dual-motive case to prove its innocence by a "preponderance of the testimony."

As the Solicitor General demonstrated in his petition for certiorari in *Transportation Management Corp.*, the question thus presented is of great importance in the administration of the Act and has been the subject of conflicting decisions among the Circuits. The Solicitor General cited *Behring International Inc.* v. *NLRB*, 675 F.2d 83 (3d Cir. 1982) as in agreement with the First Circuit in *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982) and decisions of the Sixth, Eighth and Ninth Circuits to the contrary.

Decision by this Court of *Transportation Management Corp.* will thus have a direct bearing on the correctness of the decision of the court of appeals in the instant case.

Certiorari should therefore be granted and, if administratively feasible, this case should be set down for argument together with *Transportation Management Corp.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE G. GALLANTZ
Counsel for Petitioner

ALLAN H. WEITZMAN
MARK L. GOLDSTEIN
PROSKAUER ROSE GOETZ & MENDELSOHN
Of Counsel

January 10, 1983

918

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, Respondent.

No. 81-7027.

United States Court of Appeals, Eleventh Circuit

Aug. 13, 1982.

The National Labor Relations Board applied for enforcement of order. The Court of Appeals, Arnold, Circuit Judge, sitting by designation, held that: (1) evidence supported findings by the Board that vice-president's comments on employee's possibly losing her job because of union activity constituted threat of discharge, that conversation constituted illegal interrogation, that conversation created impression of surveillance, and that such incident constituted violation of National Labor Relations Act section making it unlawful for employer to interfere with, restrain or coerce employees in exercise of their right to self-organization, and (2) substantial evidence also supported findings of the Board that discharged employees were treated differently from other employees with regard to performance of employment tasks, that discharged

918 employees engaged in protected, concerted activity in protesting employer's demand that they perform work task in particular manner, that employer's asserted basis for employees' termination was pretextual, and that discharges constituted unfair labor practices.

Enforcement ordered.

1. Labor Relations 367

Violation of National Labor Relations Act section making it unlawful for employer to interfere with, restrain or coerce employees in exercise of their right of self-organization occurs when employer's questions, threats, or statements tend to be coercive and not only when employees are in fact coerced, and coercive nature of employer's conduct is to be determined in

light of all circumstances surrounding particular instance of conduct. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

2. Labor Relations 557, 570

Evidence supported findings by National Labor Relations Board that vice-president's comments on employee's possibly losing her job because of union activity constituted threat of
919 discharge, that conversation constituted illegal interrogation, that conversation created impression of surveillance, and that such incident constituted violation of National Labor Relations Act section making it unlawful for employer to interfere with, restrain or coerce employees in exercise of their right of self-organization. National Labor Relations Act, §§ 7, 8(a)(1) as amended 29 U.S.C.A. §§ 157, 158(a)(1).

3. Labor Relations 561

Substantial evidence supported findings of National Labor Relations Board that discharged employees were treated differently from other employees with regard to performance of employment tasks, that discharged employees engaged in protected, concerted activity in protesting employer's demand that they perform work task in particular manner, that employer's asserted basis for employees' termination was pretextual, and that discharges constituted unfair labor practices. National Labor Relations Act, §§ 8(a)(1, 3), 10(c) as amended 29 U.S.C.A. §§ 158(a)(1, 3), 160(c).

Penny Pilzer, Atty., N. L. R. B., Washington, D. C., for petitioner.

Allan H. Weitzman, George G. Gallantz, New York City, Joan McAvoy, Washington, D. C., for respondent.

919 Before FAY, VANCE and ARNOLD*, Circuit Judges.

* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

N. L. R. B. v. BREWTON FASHIONS, INC., ETC.

ARNOLD, Circuit Judge:

The National Labor Relations Board, pursuant to § 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(e), applies for enforcement of its order[1] against Brewton Fashions, Inc., a division of Judy Bond. The Board found that Brewton had violated § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by interrogating its employees about their union activities, by creating the impression of surveillance of those union activities, and by threatening its employees with discharge because they engaged in such activities. The Board also found violations of §§ 8(a)(3) and (1), 29 U.S.C. §§ 158(a)(3) and (1), in the discharge of two employees, Kathleen Chavers and Grace Boozer, for their protected, concerted activities. We enforce the Board's order.

I.

Brewton Fashions manufactures women's blouses in Brewton, Alabama. In 1963, the Board found the company in
919 violation of the NLRA by discriminatorily discharging ten employees, one of whom was Kathleen Chavers. The employees were later reinstated.[2]

Since 1978, Brewton has pursued a campaign to improve the efficiency of its plant. Some jobs were abolished, and certain tasks were consolidated within the remaining job descriptions. In March 1979, Kathleen Chavers was informed that in addition to her duties as a trimmer in the cutting room, she would have to push a cart loaded with her finished material into the sewing room. She pushed the loaded cart on one occasion, but then complained that it was too heavy and that she was unable to perform the task alone. Subsequently, a fellow employee, Grace Boozer, volunteered to help Chavers push the cart to the sewing room, and together they unloaded its contents.

---

[1] The Board's decision is reported at 252 N.L.R.B. 148 (1980).

[2] The case is reported at *Brewton Fashions* v. *NLRB*, 361 F.2d 8 (5th Cir.), *cert. denied*, 385 U.S. 842, 87 S.Ct. 95, 17 L.Ed.2d 75 (1966).

On March 30, Plant Manager Robert Bays called Chavers and Boozer to his office and inquired why they refused to do their assigned work, i.e., pushing and unloading the cart individually. Both employees told Bays that they were physically unable to push the cart alone. Bays reprimanded Chavers and Boozer and told them to think about the matter over the week end. He gave them a choice of either performing the job as directed or not returning to work at all on Monday.

920 Chavers and Boozer reported to work on Monday, April 2, but continued to push the cart together. Later that day, they were again called into Bays's office and asked whether they intended to perform the job separately. Both employees responded, as before, that they were physically unable to do the work as directed. After some discussion, the Vice-President of Manufacturing, James Byrd, joined the meeting. There is some dispute over what actually transpired during the rest of the meeting,[3] but it is agreed that Chavers and Boozer continued after March 30 to push the cart together despite the repeated requests of their immediate supervisor, Charles Hawkins, to push it alone.

During April, 1979, another employee, Louise English, contacted the union through the aid of Kathleen Chavers, and on April 17 a union[4] representative arrived at Brewton to begin an organizational drive. Brewton admitted that it was
920 aware in April of the union's activities and that it knew Chavers and Boozer were involved with the union at that time. During this period, Supervisor Hawkins had a discussion with Grace Boozer about the union. He told her that the

[3] Chavers and Boozer stated that they understood Mr. Byrd to tell them to "both go back up there and work together and push the buggy together." Tr. 79. On the other hand, witnesses for the company testified that Chavers and Boozer indicated that they would try to perform the job individually, and that Byrd told them to try that and, if they had any problems, to inform their supervisor, Charles Hawkins.

[4] International Ladies' Garment Workers' Union, AFL-CIO.

union had closed the plant where he had worked in Mississippi. Boozer replied that she did not believe that the union would close the company's plant in Brewton. Hawkins concluded the conversation with the remark, "Well, it will close the plant for you."

On April 23, Chavers and Boozer met with vice-president Byrd in his office and again protested that they were physically unable to push the cart alone. Byrd responded by telling the two employees that he did not care how they worked the job out, but that Chavers and Boozer had to do the job as it was outlined, which meant pushing the cart individually.

Another Brewton employee, Helen Pugh, spoke with Mr. Byrd in his office on April 25. Byrd told Pugh that he had heard that she had been seen passing out "recipe cards." He further stated that they had "a girl that would testify in court that you were passing out recipe cards during working hours." Tr. 141. Pugh admitted to passing out *union* cards but stated that this had been done before working hours. She also mentioned that she had been with the union before and knew that she could lose her job for distributing union cards on
920 company time. Byrd agreed, saying "you're right, you could," and "we don't want [the union] down here, we don't need it and we don't intend to have it." Tr. 142. Pugh had worked for Brewton for seven years, but this was the first time she had ever been called to the vice-president's office.

Around May 3, Byrd held a meeting in his office with employees from each section of the company. He discussed such topics as plant production and hospital insurance. During the discussion, one employee commented that if the employees had had a union, they would have had a retirement plan. Byrd responded by stating that "the union is really not interested in getting you a retirement plan." Tr. 315. He then reached into his desk drawer and pulled out a flyer which had printed on it the words, "Don't Buy Judy Bond Blouses." After that, Byrd told the employees that "you think someone[,] a union would want to give you insurance and help you when they are saying don't buy Judy Bond blouses." Tr. 316.

Byrd admitted, however, that the flyer had been printed at least 16 years earlier.

Byrd made a speech over the plant's public address system sometime in June, 1979, in which he complimented the employees on their job performance during the first six months of the year. He then proceeded to relate that some people had
921 asked him "how to get rid of some strangers that were coming to their house." Tr. 313. Byrd informed the employees that they did not have to permit anyone to enter their homes whom they did not wish to be there. He further told the employees that anyone allowed to enter could be asked to leave and, if anyone refused, the employee could contact the sheriff or police department. Byrd mentioned that he had been advised that some employees were complaining about strangers visiting their homes and staying until 11:00 at night.

On June 18, 1979, Chavers and Boozer were called into the plant manager's office and were terminated when they once again refused to push the cart alone.

The Board found that Brewton Fashions had engaged in unfair labor practices within the meaning of §§ 8(a)(1) and (3) of the National Labor Relations Act and ordered reinstatement of the discharged employees and other remedial measures. The company, in opposition to enforcement of the Board's order, argues that the finding of the Board that Brewton Fashions violated § 8(a)(1), based on comments contained in a single conversation between vice-president Byrd and Helen Pugh, is not supported by substantial evidence on the record. It also contends that Brewton Fashions lawfully terminated Chavers and Boozer and that
921 the Board's findings that these terminations violated §§ 8(a)(1) and (3) are not supported by substantial evidence on the record as a whole.

II.

[1] Section 8(a)(1) of the National Labor Relations Act makes it unlawful for an employer to "interfere with, restrain

or coerce" employees in the exercise of their right of, *inter alia*, self-organization under § 7 of the Act,[5] 29 U.S.C. § 157. A violation of § 8(a)(1) occurs when an employer's questions, threats, or statements tend to be coercive and not only when the employees are in fact coerced. *TRW—United Greenfield Division* v. *N.L.R.B.*, 637 F.2d 410, 415 (5th Cir. 1981); *Delco-Remy Div., General Motors Corp.* v. *N.L.R.B.*, 596 F.2d 1295, 1309 (5th Cir. 1979). The coercive nature of an employer's conduct is to be determined in light of all the circumstances surrounding that particular instance of conduct. *TRW—United Greenfield Division* v. *N.L.R.B.*, *supra*, 637 F.2d at 415-16; *N.L.R.B.* v. *Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1342 (5th Cir.), *cert. denied*, 449 U.S.
921 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980). On this basis, we examine the § 8(a)(1) violations found by the Board.

The Board found that vice-president Byrd's conversation of April 25 with Helen Pugh constituted illegal interrogation. Employer interviews or interrogations of employees are not *per se* violations of § 8(a)(1). *TRW, Inc.* v. *N.L.R.B.*, 654 F.2d 307, 314 (5th Cir. 1981). An interrogation becomes illegal only when "the words themselves or the context in which they are used . . . suggest an element of coercion or interference." *Delco-Remy Div., General Motors Corp., supra*, 596 F.2d at 1309 (quoting from *N.L.R.B.* v. *Weingarten, Inc.*, 339 F.2d 498, 500 (5th Cir. 1964)). We often consider a number of factors[6] in determining whether the

[5] Section 7 states in pertinent part:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

[6] Among the factors considered relevant in evaluating the tendency of conversations to be coercive are:

> (1) the history of the employer's attitude towards its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether

interrogation in question tends to be coercive. A proper
922 evaluation of the evidence, however, requires more than merely examining a list of factors since "[i]ntimidation may occur even if all factors cut in favor of the employer." *Sturgis Newport Business Forms, Inc.* v. *N.L.R.B.*, 563 F.2d 1252, 1256 (5th Cir. 1977).

[2] Here, we are presented with a situation in which the vice-president of manufacturing called an employee into his office ostensibly to discuss whether she had been distributing "recipe" cards during working hours. This was the first time Helen Pugh had ever been asked to report to Mr. Byrd's office during her seven years of employment with Brewton. The Board was within its rights in finding that the purpose of the conversation was to elicit information from Pugh on whether she had been passing out *union* cards. Pugh admitted that she had been distributing union cards but stated that it was not done on company time. She also stated that she was aware she could lose her job for passing out union cards during working hours. Byrd confirmed Pugh's understanding of company policy on distributing union cards and then voiced his general opposition to the union's presence at Brewton Fashions. The Board found that Byrd's comments on Pugh's possibly losing her job because of union activity constituted a threat of discharge. We conclude that the context in which Byrd's comments were made, including his statement of op-
922 position to the union, support this specific finding of the Board and the overall finding of illegal interrogation.

The comments of Byrd to Pugh during their conversation of April 25 were also found by the Board to create the impression of surveillance. "Creating the impression of surveillance of union activity can be as coercive as actual surveillance and, therefore, constitute an unfair labor practice." *N.L.R.B.* v.

(footnote continued from preceding page)

this purpose was communicated to the employee; and (8) whether the employer assures employees that no reprisals will be taken if they support the union.

N.L.R.B. v. *Aero Corp.*, 581 F.2d 511, 514 (5th Cir. 1978).

Anchorage Times Publishing Co., 637 F.2d 1359, 1366 (9th Cir.), *cert. denied*, U.S. , 102 S.Ct. 137, 70 L.Ed.2d 115 (1980). The impression of surveillance was created by Byrd's statements that he had heard that Pugh had been seen passing out "recipe" cards and that the company had "a girl that would testify in court that [Pugh was] passing out recipe cards during working hours."[7] In view of all the circumstances surrounding these comments, substantial evidence supports the Board's finding that Brewton Fashions violated § 8(a)(1) of the Act.

III.

[3] We next review the evidence on the discharges of Brewton employees Grace Boozer and Kathleen Chavers. The Board found these discharges to constitute unfair labor
922 practices under both §§ 8(a)(1) and (3) of the Act. Section 8(a)(3), 29 U.S.C. § 158(a)(3), provides that,

> (a) It shall be an unfair labor practice for an employer
>
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

This provision is supplemented by § 10(c) of the Act, 29 U.S.C. § 160(c), which authorizes the Board to take remedial action but with the limitation that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

Brewton Fashions argues that Chavers and Boozer were lawfully terminated for refusing to perform their work as directed. The refusal of the two employees to push the cart separately, the company contends, justified their discharge.

---

[7] Pugh's testimony that she had been distributing union cards *before* working hours was unrebutted by the company.

The Board found, however, that Brewton's asserted basis for the employees' termination was pretextual, and that Chavers's and Boozer's discharges were the result of their "union and protected, concerted activities." Substantial evidence on the record as a whole supports the Board's findings.

923 Chavers and Boozer were discharged at a time when Brewton's opposition to the presence of the union at the plant had become clearly evident.[8] Beginning with its initial knowledge of the union's organizational efforts in April 1979, the company, through its officials, expressed its displeasure on a number of occasions at the possibility of a union at its Brewton plant. The April conversation that Supervisor Charles Hawkins had with Boozer presented the first evidence of the company's opposition to the union. Hawkins told Boozer of a union's closing the plant where he had worked in Mississippi and further stated to her that "[the union] will close the plant for you." The Board found that Hawkins had threatened Boozer with closure of the plant if the union came in.

Vice-president Byrd's comment to Helen Pugh on April 25 is further evidence of Brewton's anti-union sentiments. His statement that "we don't want [the union] down here, we don't need it, and we don't intend to have it," clearly illustrates the company's opposition to union activity. Tr. 142. Byrd made other statements over the next two months that
923 reinforced the company's position on the union's organizational efforts. In a meeting of plant employees in his office around May 3, he criticized the union, contending that it was not really interested in establishing a retirement plan for employees, and implied that the union sought to close the company, using an outdated union flyer as an example. Byrd's speech in June over the plant's public-address system

[8] We specifically note, lest there be any misunderstanding, that Brewton may dislike the union as much as it pleases and may use every legitimate means of keeping a union out of its plant. What it may not do is discharge an employee because of her union or other protected, concerted activities.

provides further evidence of anti-union animus. His remarks concerning handling "strangers" visiting the homes of plant employees were obvious references to the union's attempts at organizing workers at Brewton.

Chavers and Boozer were terminated on June 18, after most, if not all, of these incidents occurred. The Board found that the timing of the employees' discharge rendered the company's motive suspect, particularly considering Brewton's awareness of Chavers's and Boozer's active involvement with the union and the fact that the two employees were first reprimanded for refusal to push the cart separately on March 30, nearly three months earlier. See *N.L.R.B.* v. *J. W. Mortell Co.*, 440 F.2d 455 (7th Cir. 1971). Brewton Fashions offers a different explanation for its termination of Chavers and Boozer on June 18. It argues that plant management made a conscious decision to permit the two employees to continue working at Brewton in the hope that their supervisor,
923 Charles Hawkins, would succeed in persuading them to perform the job as directed. The company's position is not without support in the record. See Tr. 264-66. Brewton also contends that its final decision to discharge Chavers and Boozer came only after two other employees had complained about the "special treatment" accorded Chavers and Boozer.[9] We do not deny that the evidence presents a close question; however, "the Board is not required to establish substantial evidence that conduct is motivated *solely* by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was *'reasonably equal'* to the lawful motive prompting conduct," *N.L.R.B.* v. *Aero Corp.*, *supra*, 581 F.2d at 514-15 (emphasis ours), and that discharge would not have occurred in the absence of protected activity. We conclude that the Board has met that standard here.

[9]There was evidence that employees Georgia Little and Jessie Mae Wilson had complained to James Byrd about Chavers's and Boozer's jointly transporting the carts. Tr. 16, 310-11.

The Board also found that Chavers and Boozer had engaged in protected, concerted activity in protesting the company's demand that they push the cart separately. The Administrative Law Judge in his opinion, which was adopted by the Board, stated:

924 There is no evidence which would demonstrate that Boozer or Chavers was insincere in their [sic] asserted
924 belief that they [sic] would be hurt physically by pushing the cart alone. Each is a relatively small, middle aged woman and each had experienced serious health problems before the spring of 1979. The fully loaded cart weighed between 300 and 700 pounds and the wheels of the cart was [sic] often clogged by lint and material as it was pushed across the floor. Boozer and Chavers acted in concert when they went to Mr. Byrd on April 23, and protested that the job of pushing the cart alone was too much for either of them.

R. 344 (footnotes omitted).

Brewton Fashions contends that no protected activity was involved because the employees' conduct was to obtain an unlawful objective, was personal to Chavers and Boozer, and was not part of a group action. The company argues that the employees' refusal to push the cart separately was an effort to force Brewton to define jobs based on sexual stereotypes and therefore unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a). See *Pond* v. *Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974). This argument is based on evidence that Grace Boozer stated to Mr. Byrd that pushing the cart was "too heavy for a woman" and that it was
924 "a man's job."[10] These statements are, however, open to a

[10] Robert Bays testified that Ms. Boozer said to Mr. Byrd:

> Well, Mr. Byrd, . . . , I never have been for this women's lib[.] I never believed in it and I still believe that it's too heavy for me to do. It's a man's job, Mr. Byrd, that's all there is to it. It's a man's job.

Tr. 258. This testimony is uncontested; Ms. Boozer did not deny using those words. Tr. 66.

different interpretation and actually may be supportive of the Board's findings. No evidence suggests that Chavers and Boozer had anything other than a genuine, good-faith belief that they would be physically injured by pushing the cart alone. And it may reasonably be inferred from her statements that Boozer believed that such work would be injurious to most women at the plant.[11] So the employees' conduct may not have been purely personal to them. In addition, the fact that their conduct involved only two employees does not preclude it from being deemed concerted activity. See *N.L.R.B.* v. *C.J. Krehbiel Co.*, 593 F.2d 262 (6th Cir. 1979); *N.L.R.B.* v. *Modern Carpet Industries*, 611 F.2d 811 (10th Cir. 1979) (actions of three employees constituted concerted activity). We conclude that the Board's finding that Chavers and Boozer had engaged in protected, concerted activity is supported by substantial evidence.

924 Finally, the Board determined that Chavers and Boozer were treated differently from other Brewton employees who had also refused to push the cart alone. This finding was based on evidence that, in 1978, prior to the commencement of union organizing at the plant, employees Mary Nelson, Lois Hart, and Maxine Cunningham, were each asked to push the loaded cart alone, and each refused the request. None of these employees was disciplined as a result of her refusal to perform the job. Tr. 154-56. In addition, Louise English, who was also employed as a trimmer and bundler, was asked by plant manager Robert Bays, on the day Chavers and Boozer were discharged, if she wanted the job of pushing the cart. She declined, stating that her asthmatic condition prevented her from performing such strenuous work.[12] English was neither disciplined nor terminated because of her refusal. Tr. 166.

---

[11] There was evidence that, at the Brewton plant, pushing the carts had been a task assigned, in the past, primarily to men. Tr. 28. Men also pushed the cart after Chavers and Boozer were terminated. Tr. 164, 197.

[12] Louise English was not required by the company to submit a doctor's certificate attesting to her medical condition. Tr. 166.

Brewton Fashions argues that there was no disparate treatment of Chavers and Boozer because none of the other named employees was similarly situated to them. The company notes that Nelson, Hart, and Cunningham were asked to push the carts in 1978, *before* the reorganization of jobs in the cutting room. None of these employees was assigned the particular task; they were simply offered the work because of
925 a reduction in overall plant workload at the time.[13] Tr. 154-57.

The company contends that Louise English was not similarly situated to Chavers and Boozer because she was not employed as a trimmer on June 18, when the two employees were terminated and, therefore, the request to push the cart was not a specific assignment of the job. Tr. 170. Additionally, the company argues that if it had wanted to terminate union activists it could have terminated English on the same alleged pretext as Chavers and Boozer. English initiated the union organizing drive, and Brewton claims that it was aware of her activities.[14]

These arguments have some merit. The Board's finding here, as with many of its other findings, is obviously not supported by everything in the record. It may be that, presented with such fairly conflicting views, this Court would have made a different choice had the case been before us as triers of fact. In situations such as this, however, we may not displace the Board's choice with our own. *Universal Camera*
925 *Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456 (1951); *N.L.R.B.* v. *Aero Corp.*, *supra*, 581 F.2d at 514. We conclude that the Board's determination that Chavers and Boozer were disparately treated was supported by substantial, although not uncontradicted, evidence.

[13] Because of lack of work, employee Mary Nelson was laid off for a period of five weeks after declining the cart-loading assignment. Tr. 157.

[14] The Board stated that the record did not show that Brewton Fashions was aware of Louise English's union activities. James Byrd, however, testified that he had heard rumors that English was involved in union organizing. Tr. 19.

We hold that the findings of the Board that Brewton Fashions committed unfair labor practices are supported by substantial evidence on the record as a whole, and the Board's entire order is therefore ENFORCED.

1038 **Brewton Fashions, Inc., a Division of Judy Bond *and* International Ladies' Garment Workers' Union, AFL-CIO. Case 15-CA-7396**

September 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS AND PENELLO

On June 26, 1980, Administrative Law Judge J. Pargen Robertson issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and both the General Counsel and Charging Party filed briefs in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

1038 Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Brewton Fashions, Inc., a Division of Judy Bond, Brewton, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

---

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In adopting the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging employees Grace Boozer and Kathleen Chavers because of their union or other protected activities, Member Penello does not rely on the Administrative Law Judge's reference to *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

[3] Member Jenkins would award interest on the backpay due in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB No. 11 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees about their activities on behalf of International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization.

WE WILL NOT create the impression among our employees that we are engaged in surveillance of our employees' union activities.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT discharge our employees for engaging in union activities or concerted activities protected by the National Labor Relations Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

1038 WE WILL offer Kathleen Chavers and Grace Boozer immediate and full reinstatememt to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

WE WILL make Kathleen Chavers and Grace Boozer whole for any loss of earnings they may have suffered as a result of our discrimination against them, with interest.

DECISIONS OF NATIONAL LABOR RELATIONS BOARD

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge: This case was heard on January 23 and 24, 1980, at Brewton, Alabama. The charge was filed on August 27, 1979. The complaint, which issued on October 17, 1979, and was amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by interrogating employees concerning their union activities, threatening its employees with plant closure because of the Union, and creating the impression of surveillance of its employees' union activities; and that Respondent violated Section 8(a)(1) and (3) of the Act by terminating the employment of Grace Boozer and Kathleen Chavers because of their protected concerted activities or union activities.

Upon the entire record and from my observations of the witnesses, and after due consideration of the briefs filed by the General Counsel,[1] Respondent, and the Charging Party (Union), I hereby make the following:

FINDINGS

I. THE EVIDENCE

1039 Respondent is engaged in the manufacture of women's blouses at its facility in Brewton, Alabama.[2]

---

[1] The General Counsel, in his brief, moved to correct two errors in the transcript. I find merit to that motion and hereby grant it. The General Counsel also moved in his brief to conform the pleadings to the proof in regard to par. 6(a) of the complaint. I shall grant the General Counsel's motion in that regard by examining the conversation which allegedly contained statements violative of Sec. 8(a)(1), to determine whether the evidence supports my finding a violation.

[2] The commerce facts and conclusions are not at issue. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. The answer also admits, and I find, that the Charging Party is a labor organization within the meaning of Sec. 2(5) of the Act.

BREWTON FASHIONS, INC.

From the fall of 1978, Respondent has engaged in a campaign to improve the efficiency of its plant. The steps taken in that regard included abolishing some jobs and consolidating functions formerly included among the duties of several jobs into a single job.

In that regard Supervisor Charles Hawkins notified employee Kathleen Chavers[3] in March 1979 that, in addition to her other job duties as a "trimmer" in the cutting department, she would have to start taking the material she had worked on into the sewing room when she finished her operation.

After trimming, the bundles of material are loaded on a cart (or buggy) which is pushed into the sewing department where the bundles are placed in storage racks. The bundles of material varied in weight but, according to the testimony of one of Respondent's witnesses, each averages 10 to 15 pounds. The cart, according to the same witness, is approximately 4 feet long and 3 feet high. It has two stationary wheels and two casters at each end to permit steering. The floor of the
1039 cart is made of wood. Other testimony reflected that the cart is slightly less than 3 feet wide. The cart is pushed from the cutting department into sewing where the bundles are stored in storage racks (bins). The bins include three shelves with the highest shelf being 5 feet off the floor.

Chavers protested to Hawkins that she did not know if she could do the additional work of pushing the cart and storing the bundles in the bins. However, she followed his instructions and pushed the loaded cart to the bins where she unloaded the bundles. After finishing the task, Chavers returned to Hawkins and told him that "I don't believe I can push the buggy, it's too much." Hawkins made light of her concern.

---

[3]Chavers was involved in an earlier National Labor Relations Board proceeding. She was found to have been discharged by Respondent in violation of the Act in the case cited at 145 N.L.R.B. 99 (1963). In 1967, Chavers was reinstated in accordance with a court order in *Brewton Fashions, Inc.* v. *N.L.R.B.*, 361 F.2d 8 (5th Cir. 1966), cert. denied 385 U.S. 842.

Thereafter, on each occasion when the cart was loaded, fellow "trimmer" Grace Boozer came over and helped Chavers transport the bundles to sewing. The two employees would push the cart together and unload the bundles into the bins together.

However, on March 30, 1979, Chavers and Boozer were called into Plant Manager Robert Bays' office. Bays testified that during that meeting he asked both employees why they refused to do the assigned work (pushing the cart and unloading the bundles individually rather than together). Chavers and Boozer both told Bays that they were physically unable to perform those tasks alone. Bays said that he reprimanded the employees and told them to think about the matter over the weekend and, if they agreed to come back and perform the tasks as directed, they should report back on Monday. Otherwise they should not bother to report back to work.

Both Chavers and Boozer reported for work on Monday, April 2, 1979. However, they continued to push the cart together. That afternoon they were again called into Bays' office. Chavers and Boozer were again asked if they were going to perform the tasks separately and both responded as they had on March 30. After some discussion the vice president of manufacturing, James Byrd, came into the meeting. The discussion continued.[4] However, there are conflicts on
1039 what occurred during the meeting. Chavers and Boozer contended that they continued to insist that they were unable to perform the task of pushing the cart. They understood Byrd to tell them at the end of the meeting that they could go back and push the cart together. Respondent's witnesses all testified that Chavers and Boozer indicated they would try to push the cart one at a time and that Byrd told them to try that and, if they had trouble, to tell their supervisor, Charles Hawkins.

[4] During those discussions Chavers told Byrd and Bays that they were prohibited from changing her job under the court order (see fn. 3, *supra*), Bays sent for Chavers' file and read the letter from the Board regarding Chavers' reinstatement.

In any event, the evidence is not disputed that Chavers and Boozer continued to push the cart together. Neither made any attempt after March 30 to push the cart alone. Both admit that their supervisor, Charles Hawkins, continued to ask them to push the cart alone.

During April, employee Louise English ascertained from Kathleen Chavers how to contact the Union. Thereafter, English contacted the Union and, on April 17, 1979, Union Representative Bob Vest came to Brewton and commenced an organizational drive among Respondent's employees.

Respondent admitted that it learned of the Union's campaign in April. Respondent also admitted learning in April that Boozer and Chavers were involved in the Union's activities.

Grace Boozer testified without contradiction that she had a conversation with Supervisor Hawkins about the Union.[5] Hawkins told Boozer that the Union had closed the plant where he worked in Mississippi. Boozer replied that she did not think that the Union would close the plant. Hawkins replied that it did in the one in which he had worked. Boozer said that they had a union at one time and it did not close the plant. Hawkins said, "Well, it will close the plant for you."

On April 23, Chavers and Boozer went to Byrd's office and asked to meet with him.[6] Bays testified that both Chavers and Boozer again protested that they were physically unable to push the cart alone. Bays said that the meeting ended with

[5] I credit Boozer's testimony about her conversation with Hawkins. However, I do not credit her recollection that the conversation occurred during March. The overwhelming evidence indicated that the union campaign did not start, and Respondent did not learn of the campaign until April. Therefore, I find that her conversation with Hawkins regarding the Union did not occur until April 17, or afterward.

[6] Although Chavers and Boozer did not include this conversation in their testimony, they were not called to rebutt that the meeting occurred as indicated by the testimony of Byrd and Bays. I credit the testimony of Respondent's witnesses in that regard and find that the April 23 meeting occurred in accord with that testimony.

Byrd telling the two employees that he did not care how the employees worked the job out (whether Chavers or Boozer pushed the cart), but that they would have to do the job as it was outlined.

On April 25, employee Helen Pugh was told by her supervisor that James Byrd wanted to see her in his office. Byrd told Pugh that he had heard that she had "been seen passing recipe cards." Byrd said that they had a "girl that would testify in court that you were passing out recipe cards during working hours." Pugh replied that she did not call them recipe cards that what she had "is union cards." Pugh admitted passing out union cards but contended that she had passed them out before working hours. Pugh told Byrd that she had been with the Union before and she knew she could lose her job over it. Byrd replied, "You're right, you could. We don't want it [Union] down here, we don't need it and we don't intend to have it." Pugh testified that, although she had worked for Respondent for 7 years, this occasion was the first time she had been called into the office.[7]

Around May 3, Byrd called several employees into his office. Helen Pugh, who was one of the employees, testified that the meeting included two employees from each section. Pugh testified that Byrd talked some about production. Byrd recalled discussing hospital insurance. According to Byrd, one employee commented that they would have a retirement plan if they had a union. Byrd testified that he said that the Union was not really interested in getting the employees a retirement plan. Byrd then held up a flyer which had the union label printed on its face along with "Please Don't Buy
1040 Judy Bond Blouses!"[8] Byrd testified that he told the employees, "You think a union would want to give you insurance

[7] Byrd did not deny Pugh's testimony regarding their April 25 conversation.

[8] A witness for the Union testified that the flyer Byrd held up was distributed by the Union during the 1960's. Byrd testified that he told the employees in the May 3 meeting, when referring to the flyer, that that was something that had happened 16 years ago.

and help you when they are saying don't buy Judy Bond blouses."

Several employees testified about Byrd making a public address speech to the employees. Apparently the speech was made in June 1979.[9] Byrd said that he complimented the employees on a "fine first six months." He went on to say that some had asked him "how to get rid of some strangers that are coming to their house." According to Byrd, he said that the employees did not have to let anyone in their houses if they did not want to. He told the employees that they could ask the strangers to leave but that, if they did not leave after they were asked twice, then they (the employees) could call the sheriff's department or police department. Byrd also said that he had been advised that some people were saying that people were visiting their houses and staying until 11 p.m.

On June 18,[10] Boozer and Chavers were called into the plant manager's office. Prior to calling in Boozer and Chavers, Plant Manager Bays prepared a statement which he planned to have Boozer and Chavers sign if they continued to refuse to push the cart separately. That statement read:

> June 18, 1979. The above listed people met to discuss the job of Trim & Bundle. Robert Bays explained that the Engineering Project has been completed in the Cutting Room and that the job of taking the work to the sewing room and putting it in the bins is to be done by one person. Both Grace Boozer and Kathleen Chavers
> 1040 stated that they were physically unable to perform this portion of their job alone. They requested that they be allowed to bring the work up together. Robert Bays stated that the job had been done in the past by one

[9] Byrd testified that the public address speech was made shortly before the July 4 vacation.

[10] Boozer and Chavers testified that they were first called into Bays' office on June 15, and asked again if they would push the buggy separately. When they told him they could not physically do that work, Bays said he would have to talk with Byrd. Bays denied that he met with Boozer and Chavers on June 15. Bays admits the June 18 meeting and discharges.

person and it would have to be done this way. He stated that the company cannot make the job to fit the employees' physical restrictions.

According to Grace Boozer's testimony, Bays told her and Chavers that he had their termination slips ready if they were not going to push the buggy. Boozer and Chavers replied that they could not push the buggy. Bays, they said, said that "Mr. Byrd said there wasn't anything else to say that he had to give us our termination slips." Boozer and Chavers were terminated.

Later, on June 18, Bays called employee Louise English[11] into his office. Bays told English that he had terminated Boozer and Chavers because they refused to push the buggy alone. Bays then said to English, "We're offering you the job." English replied, "I have asthma, I can't push it." Bays said, "Well I heard you did and you go on back to pinning and we'll call somebody else."

II. CONCLUSIONS

A. The Alleged 8(a)(1) Violations

1. Threat of plant closure

In support of its allegation that Respondent threatened its employees with plant closure, the General Counsel points to evidence of a meeting which Vice President Byrd had with employees around May 3, 1979. According to the testimony of employee Helen Pugh, Byrd held up a "flyer" which indicated, "Please Don't Buy Judy Bond Blouses," and contained the Union's label. Byrd said, "You see what they're doing to us." Pugh said the discussion then went to company benefits. As the employees started to leave Byrd said that "you have to be careful how you word things because it will always come back to you." As they left, Byrd remarked that

[11] English, like Chavers and Boozer, was employed as a "Trim & Bundle" employee.

1041 he was the first one at Respondent's Brewton facility, and he would be the last one to leave.[12]

Byrd admitted having the above conversation on May 3. According to Byrd he held up the union flyer when an employee stated that if they had a union they would have a retirement plan. Byrd said that he remarked as he held up the flyer, "You think a union would want to give you insurance and help you when they are saying don't buy Judy Bond Blouses." Byrd denied that he said during that meeting that he was the first person here and he would be the last one to leave.

As to the conflict in their testimony, I credit the account of Helen Pugh. Pugh's testimony, which preceded that of Byrd, was substantially in accord with Byrd's. Pugh, who impressed me as a candid witness, is still employed by Respondent. Her other testimony, which as shown below, included another alleged 8(a)(1) conversation with Byrd, was not denied by Byrd. Additionally, the comment itself, i.e., first here and last to leave, does not impress me to make up a damaging comment. The normal tendency would be to make the statement stronger than the subtle comment Byrd allegedly made.

However, despite my crediting Pugh's testimony, I find that Byrd's comments in this regard do not rise to the level of an 8(a)(1) violation. His comment that he would be the last to leave is ambiguous in that it did not necessarily connote an intent to close the plant or loss of jobs. Therefore, I find that Respondent did not violate Section 8(a)(1) in this particular instance.

---

[12] Although the transcript indicates Pugh testified that Byrd said he would be the first one to leave, I have granted the General Counsel's motion to correct the transcription to reflect that Byrd said that he would be the last one to leave.

2. Impression of surveillance

Several witnesses, including James Byrd, testified about a public address system address which Byrd made to the employees during June 1979. According to Byrd's testimony, he told the employees:

> I said there are some people that have asked me how to get rid of some strangers that are coming to their house
> 1041 and you don't have to let anybody in your house if you don't won't [sic] to. If they do come in you can ask them to leave once. If they don't leave, you can ask them to leave again. If they don't leave then you can call the sheriff's department or police department. You don't have to let anyone in your house that you don't want to.

Byrd admitted that he was referring to union organizers when he made the above comments. According to the testimony of former employee Katherine Nelson, Byrd said that he had received word that the employees were having late night visitors.[13]

In this particular instance I credit Byrd's account of his speech even though I found Nelson to be a straight-forward, candid witness. Nelson implied that she was not in a position to hear the speech clearly by commenting, "The best I could hear of it, they were talking about having night visitors in your home."

Although Byrd's version of the speech does raise some questions, he does imply that he received his information about the night visitors through voluntary employee comments by stating, "there are some people that have asked me how." I find that Byrd's comments were not likely to demonstrate to employees that Respondent was engaging in surveillance of activities of union organizers or of surveillance of

[13] However, the testimony of Louise English is more in accord with Byrd's. According to English, Byrd stated that some employees had said to him that people were being visited at night.

visitors to employees' homes. I find that Respondent did not violate the Act in this particular instance.

3. Interrogation and impression of surveillance

Employee Helen Pugh testified that, on April 25, James Byrd called her to his office where:

> [H]e said we have heard that you have been seen passing recipe cards, and I looked at him funny, and I said Sir? And he said we heard already, we've got a girl that would testify in court that you were passing out recipe cards during working hours. And I sort of laughed and said no sir, I don't call them recipe cards to start with. I
> 1042 said what I have is union cards. I said I was passing them out. I gave three girls cards; they gave them back to me but it was before working hours, before 7 A.M. I had them in my purse before 7 A.M. I said I'm no fool and I know that you're not supposed to do that during company time. And I said I have been with the union before and I know that I can lose my job over it. And he said, you're right, you could. So he said, we don't want it down here; we don't need it and we don't intend to have it. And I said well I have worked for unions before and I said I think it's good for the people and I think it will help them down here. And I said I have signed the card myself and I think it would be good for everybody. And he said, everybody is entitled to their own opinion. And, I said, well you're right there. And he went on and kept talking and he said, he told me again I believe it was twice he told me that day that he didn't need it, didn't want it and he didn't intend to have it.

Pugh testified that that was the first time she had been called into the office during her 7 years work with Respondent. Although Byrd testified after Pugh, he did not testify about this particular conversation. As indicated above, I found Pugh to be a credible witness.

I find, in agreement with the General Counsel, that the above conversation contains comments which constitute violations of Section 8(a)(1). Respondent offered no evidence to show that Byrd was relying on information that Pugh was passing out recipe cards or that he had actual information that the activity occurred during working hours. I find that his comments about recipe cards were ruses designed to get Pugh to defend her action of passing out union cards. I find that his comments in that regard constituted illegal interrogation and created the impression of surveillance, in view of the unrebutted evidence that Pugh was not passing out cards during working hours. Moreover, I find that Byrd's comment that she could lose her job because of her union activities constituted a threat of discharge.[14]

4. The discharges

1042 Respondent contends that Grace Boozer and Kathleen Chavers were fired because they refused to perform their assigned task of pushing the cart. The General Counsel and the Union contend that Respondent's asserted basis for the discharges was pretextuous. In support of their contention the General Counsel and the Union point to several factors. The evidence does show that from before March 30, 1979, both Boozer and Chavers refused to push the cart alone on the basis of their contention that they were both physically unable to perform that task. Only on March 30 did they receive any disciplinary action for their refusal. Additionally, it is undisputed that both Chavers and Boozer were long-term employees with excellent work records. Neither had presented disciplinary problems to Respondent before March 30, and their supervisor stated that both were good workers. Moreover, the record failed to show that their work efficiency suffered as a result of their joint efforts in pushing and

[14] Byrd's threat of discharge is related to and intertwined with the complaint allegations, and, I find, this matter was fully litigated. See *The Estate of Alfred Kaskel d/b/a Doral Hotel and Country Club*, 240 NLRB 1112 (1979).

unloading the cart. Respondent did not deny that that joint activity occupied only a small portion of their worktime.

Additionally, undisputed evidence proved that other employees were not disciplined for refusing to push the cart alone. In 1978, before the union activity, employees Nelson, Lois Hart, and Maxine Cunningham refused to push the cart after being asked by Respondent. None of those employees was disciplined for his or her refusal to perform the cart pushing task. Moreover, on June 18, shortly after the discharge of Boozer and Chavers, employee Louise English,[15] who held the same position as Boozer and Chavers, refused to push the cart alone on the ground that she was physically unable to perform the task. English was not disciplined.

I am persuaded that the evidence does demonstrate that
1042 something more than the pushing of the cart was involved in the discharges of Boozer and Chavers. No explanation was offered as to why Respondent decided to discharge two valuable employees for action which it permitted in other employees both before and after their discharge. Nor did Respondent show with persuasion why it permitted Boozer and Chavers to push the cart together for over 2½ months without taking corrective action.

Therefore, I shall consider the evidence in attempting to determine the true reason for the discharges of these two employees.

The record is clear that both Boozer and Chavers engaged in activities designed to support the Union during the organizing campaign. Respondent admitted that it was aware of union activities among its cutting department employees and

[15] English was the employee that first contacted the Union. She, like Chavers and Boozer, engaged in union activity during the campaign. However, that evidence does not defeat the General Counsel's contention that the failure to discipline English demonstrated disparate treatment. The record does not show that Respondent was aware of any of English's union activities.

that it was aware of the union activities of Boozer and Chavers.

Moreover, the record is clear, and I find, that Boozer and Chavers engaged in protected concerted activity in protesting Respondent's request that they push the cart alone. There is no evidence which would demonstrate that Boozer or Chavers were insincere in their asserted belief that they would be hurt physically by pushing the cart alone. Each is a relatively small, middle aged woman and each had experienced serious health problems before the spring of 1979.[16] The fully loaded cart weighed between 300 and 700 pounds and the wheels of the cart were often clogged by lint and material as it was pushed across the floor. Boozer and Chavers acted in concert when they went to Byrd on April 23, and protested that the job of pushing the cart alone was too much for either of them.[17]

The evidence reflects facts which support the General Counsel's contention of union animus. The General Counsel
1042 cited the prior case which involved, among others, Kathleen Chavers.[18] Additionally, Respondent, through James Byrd, demonstrated through the public address system speech, Byrd's May 3 discussion with several employees, and Byrd's April 25 conversation with employee Helen Pugh, that it strongly opposed the Union. In his 8(a)(1) conversation with Pugh, Byrd twice stated that he did not want a union down here, he did not need it, and he did not intend to have it. Additionally, the evidence is uncontested that Supervisor Charles Hawkins threatened Grace Boozer with plant closure if the Union came in.

---

[16] Chavers had abdominal surgery in the fall of 1978. Boozer testified that she had experienced bladder problems.

[17] See *N.L.R.B.* v. *Washington Aluminum Company, Inc.*, 370 U.S. 9 (1962); *Alleluia Cushion Co., Inc.*, 221 N.L.R.B. 999 (1976); *Pink Moody, Inc.*, 237 N.L.R.B. 39 (1978).

[18] *Brewton Fashions, Inc.* v. *N.L.R.B.*, 361 F.2d 8 (5th Cir. 1966), enfg. 145 N.L.R.B. 99 (1963), cert. denied 385 U.S. 842.

The record supports, and I find, that Chavers' and Boozer's discharges were the result of their union and concerted activities. If there were any doubt that Respondent recalled Chavers' involvement in the discharge case during the 1960's,[19] that doubt was dispelled on April 2 when Chavers told Byrd and Bays that the court order did not permit Respondent to change her job. The total record, and especially the evidence of Respondent's union animus, the disparate treatment of Boozer and Chavers,[20] and the timing of the discharges during the midst of the Union's campaign convince me, and I find, that the two employees were discharged in violation of Section 8(a)(1) and (3) of the Act.

Upon the foregoing findings of fact and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Respondent Brewton Fashions, Inc., a Division of Judy Bond, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees about their union activities, creating the impression of surveillance of its employees' union activities, and threatening its employees with discharge, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

1043

4. By discharging its employees Kathleen Chavers and Grace Boozer on June 18, 1979, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

---

[19] *Ibid.*

[20] In addition to the above facts, an official of Respondent admitted that, as of the time of the hearing, women employees occasionally teamed up to push the cart.

5. Respondent did not engage in additional unfair labor practices as alleged in the complaint.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully discharged Kathleen Chavers and Grace Boozer, I shall recommend that Respondent be ordered to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. I shall further recommend that Respondent be ordered to make Chavers and Boozer whole for any loss of earnings they may have suffered as a result of the discrimination against them. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[21]

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

---

[21] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

ORDER[22]

1043 The Respondent, Brewton Fashions, Inc., a Division of Judy Bond, Brewton, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees about its employees' union activities, creating the impression of surveillance of its employees' union activities, and threatening its employees with discharge because they engage in union activities.

(b) Discharging and refusing to reinstate its employees because of its employees' union activities and protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Offer Kathleen Chavers and Grace Boozer immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make whole Chavers and Boozer for any loss of earnings suffered by them as a result of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve, until compliance with the order for reinstatement and backpay, and, upon request, make available to the

[22] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

National Labor Relations Board and its agents, for examination and copying, all payroll records, social security records, timecards, and other records that are relevant to a determination of any right of reinstatement and the amount of backpay due under this Order.

(c) Post in conspicuous places at its place of business in
1043 Brewton, Alabama, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix A." Copies of this notice, on forms provided by the Regional Director for Region 15, shall, after being signed by an authorized representative of Brewton Fashions, Inc., be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by Brewton Fashions, Inc., to insure that the notices are not covered, altered, or defaced by any material.[22]

(d) Notify the Regional Director for Region 15, in writing, within 20 days of the date of this Order, what steps it has taken to comply herewith.

---

[22] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 81-7027

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

versus

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, *Respondent.*

Application for Enforcement of an Order of the National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 13, 1982, 11 Cir., 198 , F.2d).
(.)

Before FAY, VANCE and ARNOLD*, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

PETER T. FAY

United States Circuit Judge

* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 81-7027

N.L.R.B. Docket No. 15-CA-7396

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

versus

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, *Respondent.*

Application for Enforcement of an Order of the National Labor Relations Board

Before FAY, VANCE and ARNOLD*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the National Labor Relations Board's application for enforcement of its order, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the enforcement of the National Labor Relations Board's order in this cause be, and the same is hereby, ENFORCED;

It is further ordered that respondent pay to petitioner, the costs on appeal to be taxed by the Clerk of this Court.

August 13, 1982

* Honorable Richard S. Arnold, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Office-Supreme Court, U.S.
FILED
MAR 10 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1209

In the Supreme Court of the United States

OCTOBER TERM, 1982

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PENNY PILZER
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged two employees because of their union and other protected activities rather than because of their refusal to perform certain work that they contended was beyond their physical capacity.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 6

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Brewton Fashions, Inc. v. *NLRB*, 361 F.2d 8, cert. denied, 385 U.S. 842 4

Consolo v. *Federal Maritime Commission*, 383 U.S. 607 8

NLRB v. *Aero Corp.*, 581 F.2d 511 8

NLRB v. *Transportation Management Corp.*, cert. granted, No. 82-168 (Nov. 15, 1982) 6, 7, 8

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 8

Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, 455 U.S. 989 ..... 6-7, 8

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

Section 8(a)(1), 29 U.S.C. 158(a)(1) 4

Section 8(a)(3), 29 U.S.C. 158(a)(3) 4

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1209

BREWTON FASHIONS, INC., A DIVISION OF JUDY BOND, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-15) is reported at 682 F.2d 918. The decision and order of the National Labor Relations Board (Pet. App. A-16 to A-18) and the underlying decision of the administrative law judge (Pet. App. A-19 to A-35) are reported at 252 N.L.R.B. 1038.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1982 (Pet. App. A-37). A petition for rehearing was denied on October 18, 1982 (Pet. App. A-36). The petition for a writ of certiorari was filed on January 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner manufactures women's blouses at its facility in Brewton, Alabama. In March 1979, as part of an efficiency drive begun in the fall of 1978, employee Kathleen Chavers was informed that, in addition to her duties as trimmer in the cutting room, she would be required to push into the sewing room the cart into which she had placed her finished material. The cart weighed between 300 and 700 pounds when loaded, and its wheels often became clogged with refuse from the cutting room floor (Pet. App. A-12, A-31). After pushing the cart on one occasion in response to the instruction, Chavers told her supervisor that the cart was too heavy for her to push by herself. Thereafter, fellow employee Grace Boozer assisted Chavers in pushing the cart into the sewing room, and together they unloaded its contents (*id.* at A-3, A-21). Both Chavers and Boozer are small, middle-aged women, and both had experienced serious health problems before the spring of 1979 (*id.* at A-31). Both were long-term employees with excellent work records (*id.* at A-29).

On March 30, Plant Manager Robert Bays called Chavers and Boozer to his office and questioned them about their refusal to push and unload the cart individually, as they had been told to do. The employees replied that they were physically unable to push the cart alone. Bays informed them they must either perform the work as directed or not return to work the following Monday. Despite Bays' ultimatum, Chavers and Boozer reported to work on Monday, April 2, and continued to push the cart together. Later in the day, they were again called to Plant Manager Bays' office; they again told Bays that they were physically unable

to push the cart alone. The meeting ended without a resolution of the matter, and Chavers and Boozer continued to push and unload the cart together, despite the requests of their immediate supervisor, Charles Hawkins, that they push it alone (Pet. App. A-4, A-21 to A-22). On April 23, Chavers and Boozer met with James Byrd, petitioner's Vice-President of Manufacturing, and again protested that they were physically unable to push the cart alone. Byrd told them that they must perform the job as instructed, that is, by pushing the cart individually (*id.* at A-5, A-22 to A-23).

Meanwhile, a union organizing campaign began at petitioner's facility in April. Petitioner knew of the drive soon after it began and was aware that Chavers and Boozer were involved with the union during this period (Pet. App. A-4, A-30 to A-31). On various occasions during the union drive, petitioner's supervisory personnel expressed animus toward the union, interrogated an employee concerning union activities, suggested that union activity might lead to discharge of an employee, and created the impression of surveillance of union activities (*id.* at A-4 to A-9, A-28 to A-29).

On June 18, 1979, Chavers and Boozer were called into Plant Manager Bays' office. When they again insisted that they were unable to push the cart individually, they were terminated (Pet. App. A-6). Thereafter, Plant Manager Bays asked another employee if she wanted the job of pushing the cart. The employee declined on the ground that an asthmatic condition prevented her from performing such strenuous work. She was neither disciplined nor fired as a result of her refusal (*id.* at A-13, A-25). Thereafter,

employees occasionally teamed up to push the cart (*id.* at A-32 n.20).[1]

2. The Board, adopting the decision of the Administrative Law Judge ("ALJ"), held, *inter alia,* that petitioner violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging Chavers and Boozer because of "their union or other protected activities" (Pet. App. A-17 n.2, A-32). In finding that the discharges were motivated by animus toward the union activities of the two employees, the ALJ relied on "the timing of the discharges during the midst of the Union's campaign," disparate treatment of Chavers and Boozer compared with other employees who were not required to push the cart alone, independent evidence of petitioner's hostility to the union, including its unlawful response to the union campaign,[2] and the fact that Chavers had been expelled from the plant in violation of the Act on an earlier occasion[3] (*id.* at A-32).

The ALJ further found that petitioner's proffered explanation for the discharge — that Chavers and Boozer interfered with petitioner's efficiency drive by failing to push the cart into the sewing room individually — was pretextual. The ALJ pointed out that "the record failed to show that [the employees'] work efficiency suffered as a result of their joint efforts in pushing and unloading the cart," and that

---

[1]In addition, in 1978 three employees had refused to push the cart alone after they were asked to do so. None was disciplined for refusing to perform the task (Pet. App. A-13, A-30).

[2]The Board, upheld by the court of appeals, found that petitioner violated Section 8(a)(1) of the Act by interrogating employee Pugh about her union activities, threatening her with discharge because of those activities, and creating the impression that employees' union activities were under surveillance (Pet. App. A-6 to A-9, A-25 to A-29). Petitioner does not challenge that finding in its petition.

[3]See *Brewton Fashions, Inc.* v. *NLRB,* 361 F.2d 8 (5th Cir.), cert. denied, 385 U.S. 842 (1966).

petitioner "did not deny that that joint activity occupied only a small portion of their worktime" (*id.* at A-29 to A-30). Furthermore, "[n]o explanation was offered as to why [petitioner] decided to discharge two valuable employees for action which it permitted in other employees both before and after their discharge. Nor did [petitioner] show with persuasion why it permitted Boozer and Chavers to push the cart together for over 2½ months without taking corrective action" (*id.* at A-30). The ALJ also concluded (*id.* at A-31) that Boozer's and Chavers' protest against pushing the cart was protected concerted activity. He found no evidence to suggest that either of the employees was insincere in expressing the belief that she would be hurt physically by pushing the cart alone. The ALJ concluded that the two employees acted in concert when they went to Vice President Byrd on April 23 and protested that the job of pushing the cart individually was too much for either of them (*ibid.*).

The Board ordered, *inter alia*, that Boozer and Chavers be reinstated with backpay (Pet. App. A-18).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A-1 to A-15). The court rejected petitioner's contention that Chavers and Boozer "were lawfully terminated for refusing to perform their work as directed" (*id.* at A-9). The court concluded (*id.* at A-10) that substantial evidence supported the Board's finding that petitioner's "asserted basis for the employees' termination was pretextual, and that Chavers's and Boozer's discharges were the result of their 'union and protected, concerted activities.' " The court noted, *inter alia*, that "Chavers and Boozer were treated differently from other Brewton employees who had also refused to push the cart alone" (*id.* at A-13). The court also concluded that substantial evidence supported the Board's finding that Chavers'

and Boozer's protest against pushing the cart constituted protected concerted activity (*ibid.*).

On January 31, 1983, Justice Powell denied petitioner's application for a stay of the judgment pending disposition of the petition for a writ of certiorari.

ARGUMENT

Petitioner contends that this case involves an application of the test articulated by the Board in *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), concerning allocation of the burden of proof in "dual motive" cases.[4] This Court on November 15, 1982, granted certiorari in *NLRB* v. *Transportation Management Corp.*, No. 82-168, which raises the question of the propriety of the burden-shifting aspect of the Board's *Wright Line* test, and petitioner urges that the Court should review this case as well. However, unlike *Transportation Management*, this is not a dual motive case. Rather, the question here is simply whether substantial evidence supports the Board's finding that petitioner's proffered ground for discharging two employees was pretextual, and that the employees were discharged solely because of their union activity. Accordingly, review by this Court is not warranted.

Under the Board's *Wright Line* test, once the Board's General Counsel has established by a preponderance of the evidence that opposition to an employee's protected activities was "a motivating factor" in the employer's decision to discharge an employee, the employer nevertheless can prevail if it shows by a preponderance of evidence that it would have taken the same action "even in the absence of the protected conduct." *Wright Line, supra*, 251 N.L.R.B. at

---

[4]Dual motive cases are those in which a discharge or other disciplinary action is motivated by both legitimate and unlawful considerations.

1089. The First Circuit rejected the Board's test insofar as it places on an employer shown to have acted for an impermissible reason the burden of proving, rather than merely producing evidence, that it would have taken the same action in the absence of the protected activity. 662 F.2d at 905. The burden-shifting aspect of the Board's test, which the First Circuit rejected and which is at issue in *Transportation Management,* relates to cases in which it has been shown that the employer had two motives, one lawful and one unlawful. The Board explained in *Wright Line* that if examination of the employer's evidence reveals that "the asserted justification is a sham, in that the purported rule or circumstance * * * did not exist, or was not, in fact, relied upon," no further analysis as to motive is necessary, since animus toward the employee's concerted activities has been shown to be the only reason for the discharge. 251 N.L.R.B. at 1084. The First Circuit did not address this portion of the Board's *Wright Line* decision; indeed, in *Wright Line* itself the court upheld the Board's order because it agreed with the Board that the employer's alleged legitimate reason for the discharge was a pretext. 662 F.2d at 907-909 & n.13.

Here the Board found that the record established that petitioner discharged the two employees because of their union and other protected activity and that petitioner's asserted legitimate reason for the discharge of the two employees was a pretext (Pet. App. A-17, A-29 to A-33). The court of appeals concluded that substantial evidence supported the Board's findings (*id.* at A-9 to A-15). Neither the Board nor the court of appeals even referred to the *Wright Line* test, and neither suggested that any burden of persuasion had been placed on the employer. Thus, the question raised in *Transportation Management* simply is

not presented in this case.[5] The question actually presented — whether the Board's findings are supported by substantial evidence — is one that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[6]

---

[5]Petitioner relies (Pet. 6) on a statement in the court of appeals' opinion (Pet. App. A-11) (emphasis in original) that "the Board is not required to establish substantial evidence that conduct is motivated *solely* by anti-union animus. It is sufficient if substantial evidence shows that the force of antiunion purpose was '*reasonably equal*' to the lawful motive prompting conduct," citing *NLRB* v. *Aero Corp.*, 581 F.2d 511, 514-515 (5th Cir. 1978), "and that discharge would not have occurred in the absence of protected activity." Like this case, the *Aero Corp.* case, from which the court quoted, did not involve a situation in which the evidence established both lawful and unlawful reasons for a discharge but instead was a case in which the court of appeals concluded that substantial evidence supported the Board's finding that the alleged lawful reason was a pretext and that the only true motive was an unlawful one. The court in *Aero Corp.* rested its decision primarily on the settled principle that a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). See also *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966). To the extent the language relied on by petitioner goes further, it appears to be dictum, for it is clear that the evidence supporting the Board's finding of unlawful motivation for the discharges is more than "reasonably equal" to any evidence showing a lawful motive (see note 6, *infra*.).

[6]In any event, the court of appeals properly concluded that substantial evidence supported the Board's finding that petitioner's asserted lawful reason for the discharges was a pretext and that its true motive was an unlawful one. The evidence showed that petitioner was aware that both Chavers and Boozer were actively involved with the union, that their supervisor had made an anti-union remark to Boozer, that the two were terminated after several other incidents that demonstrated petitioner's anti-union animus, that Chavers and Boozer were first

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

PENNY PILZER
Attorney
National Labor Relations Board

MARCH 1983

---

reprimanded for refusal to push the cart alone two and one half months prior to the date of their terminations, that both were long-term employees with good work records, that their work efficiency did not suffer as a result of their joint efforts in pushing and unloading the cart, and that other employees had not been disciplined for refusing to push the cart individually. See Pet. App. A-10 to A-11, A-29 to A-31.